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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

Conservatorship of the Person of D.C.

PUBLIC GUARDIAN OF CONTRA
COSTA COUNTY,

Petitioner and Respondent,

v.

D.C.,

Objector and Appellant.

A156144

(Contra Costa County
Super. Ct. No. MSP95-01649)

Appellant, D.C., challenges an order of the Contra Costa Superior Court, reappointing the Public Guardian of Contra Costa County (Public Guardian) as conservator of his person pursuant to the Lanterman-Petris-Short (LPS) Act (Welf. & Inst. Code,¹ § 5000 et seq.). Appellant contends the trial court committed reversible error by failing to obtain a personal waiver of his right to a jury trial. We agree and reverse.

I. BACKGROUND

We summarize only the limited facts necessary to our decision in this matter.

On August 23, 2018, the Public Guardian filed a petition seeking reappointment as appellant's conservator, alleging he was gravely disabled in that he was unable to provide for his own basic needs for food, clothing, or shelter as a result of a mental health disorder. (§ 5008, subd. (h)(1)(A).)

¹ All further statutory references are to the Welfare and Institutions Code, unless otherwise indicated.

On October 23, 2018, appellant’s appointed trial counsel informed the court that he was waiving appellant’s appearance and requested a court trial on the issue of reappointment. Counsel said: “[Appellant] indicates that he would like to have a hearing, but is agreed [*sic*] to have a court hearing and on a time waived basis. So, I think December 11th would be the next likely date.” The court set the trial for December 11, 2018.

The court held a one-day bench trial on the conservatorship petition on December 11, 2018. Appellant was present at the court trial. The trial court did not ask whether appellant waived the right to a jury trial, nor did the court advise appellant of his right to a jury trial.

Appellant testified first, followed by Michael Levin, M.D., a psychiatrist who testified as an expert for the Public Guardian. At the conclusion of the bench trial, the trial court granted the petition, finding appellant was gravely disabled beyond a reasonable doubt. Appellant timely appealed.

II. DISCUSSION

In an LPS proceeding, a proposed conservatee “shall have the right to demand a court or jury trial on the issue of whether he or she is gravely disabled.” (§ 5350, subd. (d)(1).) Probate Code section 1828, applicable to LPS proceedings through section 5350,² provides: “before the establishment of a conservatorship of the person or estate, or both, the court shall inform the proposed conservatee of . . . [¶] . . . [¶] . . . the right . . . to have the matter of the establishment of the conservatorship tried by jury.” (Prob. Code, § 1828, subd. (a)(6).) In addition, “[t]he due process clause of the California Constitution requires that proof beyond a reasonable doubt and a unanimous jury verdict be applied to conservatorship proceedings under the LPS Act.” (*Conservatorship of Roulet* (1979) 23 Cal.3d 219, 235.)

² Section 5350 provides: “The procedure for establishing, administering, and terminating a conservatorship under this chapter shall be the same as that provided in Division 4 (commencing with Section 1400) of the Probate Code, except as follows” (See *Conservatorship of John L.* (2010) 48 Cal.4th 131, 144 (*John L.*).)

In a pair of companion cases, the California Supreme Court held trial courts must obtain express, personal waivers of the right to a jury trial in recommitment proceedings for mentally disordered offenders (MDO) and defendants who plead not guilty by reason of insanity (NGI). (*People v. Blackburn* (2015) 61 Cal.4th 1113, 1130 [MDO commitment proceedings] (*Blackburn*); *People v. Tran* (2015) 61 Cal.4th 1160, 1167 [NGI commitment proceedings] (*Tran*).) As the court stated in *Blackburn*, “the decision to waive a jury trial belongs to the defendant in the first instance, and the trial court must elicit the waiver decision from the defendant on the record in a court proceeding.” (*Blackburn*, at p. 1130; *Tran*, at p. 1167 [applying same principle to NGI defendants].) Defense counsel may waive the right to jury trial on behalf of such defendants only where they lack the capacity to make a knowing and voluntary waiver. (*Blackburn*, at p. 1130; *Tran*, at p. 1167.)

Following *Blackburn* and *Tran*, two appellate courts have applied the same principles to waiver of a jury trial in the context of LPS Act proceedings. In *Conservatorship of Kevin A.* (2015) 240 Cal.App.4th 1241 (*Kevin A.*), the trial court accepted a jury trial waiver offered by Kevin A.’s attorney over his client’s express wishes. Acknowledging that the LPS statutory language differs somewhat from the language at issue in *Blackburn* and *Tran*, the appellate court nonetheless concluded the Supreme Court’s holdings in those cases applied in the LPS context and determined the trial court had erred by accepting the attorney’s waiver. (*Kevin A.*, at pp. 1244, 1248, 1253.)

In *Conservatorship of Heather W.* (2016) 245 Cal.App.4th 378 (*Heather W.*), the public guardian petitioned to be reappointed as an LPS conservator for Heather W., and the trial court set the matter for a court trial. Her counsel did not request a jury trial, and though the court advised Heather W. she had a right to testify, the court did not advise her she had a right to a jury trial. (*Heather W.*, at p. 381.) The appellate court reversed the reappointment order. Looking to *Blackburn* and *Tran*, the court explained that “MDO, NGI, and LPS proceedings have the same underlying goal—protecting the public and treating severely mentally ill persons.” (*Heather W.*, at p. 383.) Because civil

commitment impairs the liberty interests of gravely disabled persons much as prison does for convicted criminals, the court held “LPS commitment proceedings require the court to obtain a personal waiver of the right to a jury trial from the proposed conservatee.”

(*Ibid.*) Again, relying on *Tran*, the *Heather W.* court explained the error was “ ‘not susceptible to ordinary harmless error analysis and automatically requires reversal,’ ” unless the court determined on remand that Heather W. “ ‘lacked the capacity to make a knowing and voluntary waiver at the time of counsel’s waiver.’ ” (*Id.* at p. 385, italics omitted.)

Respondent argues *Heather W.* is distinguishable because in that case the record was silent as to Heather W.’s preference for a court or jury trial, whereas here, appellant’s counsel “represented to the court that he conferred with [appellant] prior to the October 23, 2018 hearing, and [appellant] agreed to elect a court trial.” But the record is not as clear as respondent contends. At the October 23 hearing, counsel said:

“[Appellant] indicates that he would like to have a hearing, but is agreed [*sic*] to have a court hearing” There was no representation that counsel conferred with his client or advised him of his right to a jury trial, appellant was not present when counsel made the statement to the court, and it is unclear from the content of the statement whether counsel was relaying his client’s wishes or merely speaking on his behalf. In light of the clear holdings in *Blackburn*, *Tran*, and *Heather W.* that the trial court must obtain an express, personal waiver of the right to a jury trial, counsel’s statement was insufficient to waive his client’s right.

Nor can we conclude the error was harmless because there was an affirmative showing, based on the totality of the circumstances, that appellant’s alleged waiver was knowing and voluntary, as respondent asserts. In *People v. Blancett* (2017)

15 Cal.App.5th 1200, 1206, the court considered whether the defendant in an MDO commitment hearing knowingly and intelligently waived his right to a jury trial. The defendant’s attorney represented to the trial court that the defendant was “ ‘okay’ ” with having a judge, rather than a jury; the trial court then inquired of the defendant, “ ‘That’s okay with you?’ ” to which the defendant responded, “ ‘Yes, your honor.’ ” (*Id.* at

p. 1203.) The appellate court concluded the waiver was not knowing and intelligent because the defendant “did not waive his right to a jury trial with full awareness of the nature of the right being abandoned and the consequences of the decision to abandon it.” (*Id.* at p. 1206.) Specifically, the court did not inform the defendant of his right to a jury trial, explain the attributes or mechanics of a jury trial, inquire whether the defendant discussed his decision with his attorney, ask whether his attorney explained the differences between bench and jury trial, or ask the defendant if he had any questions about the waiver. (*Ibid.*) Here, the trial court did not even ask appellant personally if he waived the right to a jury as did the court in *Blancett*. Further, counsel’s vague statement outside appellant’s presence that “[appellant] indicates that he would like to have a hearing, but is agreed [*sic*] to have a court hearing,” does not affirmatively demonstrate appellant understood he had a right to a jury trial, the nature of that right, and the consequences of abandoning it.

Respondent also relies on *Conservatorship of Mary K.* (1991) 234 Cal.App.3d 265 and *Conservatorship of John L.* (2010) 48 Cal.4th 131 (*John L.*) to argue appellant’s right to trial by jury could be waived by his attorney with his express consent. In *Mary K.*, the Court of Appeal held a personal waiver of the right to jury trial from the conservatee is not required and counsel may validly waive the right on his or her client’s behalf. (*Id.* at p. 271.) But *Mary K.* was decided before the Supreme Court decisions in *Blackburn* and *Tran*, and accordingly we find it unpersuasive.

In *John L.*, our Supreme Court held that if a client tells his or her appointed attorney he or she is unwilling to attend a commitment hearing and does not wish to contest a proposed LPS conservatorship, the client may reasonably expect the attorney to report such information to the court, which is binding on the proposed conservatee. (*John L.*, *supra*, 48 Cal.4th at p. 147.) *John L.* concerned the right to be present at the commitment hearing, however, not whether counsel can waive a conservatee’s right to a jury trial. “It is axiomatic that cases are not authority for propositions that are not considered.” (*California Building Industry Assn. v. State Water Resources Control Bd.* (2018) 4 Cal.5th 1032, 1043.) Moreover, *John L.* was also decided before *Blackburn* and

Tran. As a result, *John L.*'s reliance on the general presumption under Code of Civil Procedure section 283, subdivision 1, that an attorney in an ordinary civil action may bind his client (*John L.*, at p. 147) is not compelling in light of *Blackburn*'s rejection of that same principle as applied to *jury trial waivers* in civil commitment proceedings (*Blackburn, supra*, 61 Cal.4th at p. 1124), the same issue we face here.

In this case, as in *Heather W.*, the trial court failed to advise appellant of his right to trial by jury and failed to obtain an express, personal waiver from him. There is no evidence in the record, nor did the trial court find, that appellant lacked the capacity to waive his right to a jury trial. Accordingly, we must reverse.

The *Blackburn, Tran, Kevin A.*, and *Heather W.* decisions all preceded the bench trial on the reappointment petition in this case. As a result, "the error constitutes a miscarriage of justice and requires reversal, not a remand for further proceedings." (*People v. Blancett, supra*, 15 Cal.App.5th at p. 1207, citing *Blackburn, supra*, 61 Cal.4th at p. 1117.)

III. DISPOSITION

The order granting the petition for conservatorship is reversed.

Margulies, Acting P. J.

We concur:

Banke, J.

Sanchez, J.

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